

**REMARKS**

Favorable reconsideration of this application, as amended, and in light of the following discussion is respectfully requested. Claims 13-14, 16-17, 19-20, 23, 26-28, 31, 34-37, 40, 42-43, 54-90, 97-102 and 106-110 are pending. Claims 13, 23, 31, 37 and 54 have been amended. No new matter is added by these amendments. Further, none of these amendments constitutes a narrowing amendment. Claims 13, 23, 31, 37 and 54 have been amended to set forth, with specificity, that which was inherently within the claims since, as defined in the specification, the dispenser as claimed and defined includes a mechanical mixing chamber.

**Rejection Under 35 U.S.C. §112**

Claims 13, 14, 16-17, 19, 20, 23, 26-28, 31, 34-37, 40, 42, 43, 54-90 and 97-111 have been rejected under 35 U.S.C. §112, first paragraph as allegedly containing new matter. The Examiner takes the position that the term "dynamic beverage dispenser" does not appear in the specification as originally filed and she further contends that the description of the dispenser in the specification is not specific enough to limit the dispenser to a dynamic dispenser. This rejection is respectfully traversed.

Applicants, while not agreeing with the Examiner that the specification is not sufficiently specific to convey to the skilled artisan that the dispenser is a dynamic dispenser, have nonetheless removed that language from the claims and have instead specified that the dispenser includes a mechanical mixing chamber. Support for this amendment is clearly found at page 2 of the original specification, which states, "The mixture freezes on the inner surface of the mixing chamber, which is surrounded by a helical coil through which a refrigerant passes. A rotating shaft is disposed inside the

chamber which has a plurality of outwardly projecting blades that scrape the mixture off the inside wall of the mixing chamber." In view of the amendment to the claims and the explicit description of the "mechanical mixing chamber," Applicants believe that the claims comply with 35 U.S.C. 112, first paragraph. Withdrawal of all rejections on this basis is respectfully requested.

### **Rejections over Broz**

The Examiner has rejected claims 13, 14, 16, 17, 23, 26-28, 31, 34-37, 42, 43, 54-90, and 111 as anticipated under 35 U.S.C. § 102(e) by Broz, published U.S. application 2002/0197376, now U.S. Patent No. 6,741,879, having a filing date of April 12, 2002, and a provisional filing date of April 12, 2001. Applicants continue to contend that the Declaration of Grant DuBois under 37 C.F.R. § 1.131 establishes that the invention, as presently claimed, was reduced to practice prior to the filing date of Broz and is sufficient to overcome this rejection. Applicants herein clarify the new points raised by the Examiner in her response to the Declaration.

Specifically, the Examiner makes two points that Applicants believe are erroneous. First, the Examiner states that the notation on the notebook page is "need to incl. sweetness" (suggesting that it means "need to **include** sweetness"), however, the entry does not include the letter "l" used by the Examiner. The notebook entry reads "need to inc. sweetness." As noted in the Declaration of Grant DuBois, this notation refers to the "need to **increase** sweetness" in subsequent experiments. Next, the Examiner states that the formulations have "no high intensity sweeteners." As noted in paragraph 3 of the Declaration of Grant Dubois, the ingredients – including aspartame, a high intensity sweetener – are part of the formulation. Applicants did not provide a *per*

se list of the reference numbers, but instead, listed the chemical names for each ingredient in the order listed on the formulation sheet. To further clarify for the Examiner and avoid any confusion, Applicants set forth below a list with the reference numbers and the corresponding ingredients:

<u>Reference info</u>	<u>Chemical Name</u>
S8131	Potassium benzoate
S604	Aspartame
S4781	Quillaia Extract
S4773	Yucca Extract
Erythritol	Erythritol
S802	Propylene Glycol

Thus, contrary to the position taken by the Examiner, the declaration of Grant DuBois is sufficient to establish reduction to practice of the claimed invention prior to the filing date of Broz. Since U.S. application 2002/0197376 does not claim the same invention as the present application, since it is not a statutory bar under 35 U.S.C. § 102(b), and since Applicants have established prior reduction to practice pursuant to 37 C.F.R. 1.131, Broz should be removed as a prior art reference. In view of Applicants remarks regarding this declaration, withdrawal of all rejections based upon Broz is earnestly solicited.

#### **Rejections Based upon Stefandl**

The Examiner has rejected claims 23, 64-67, 69, 71, 73 and 76 have been rejected under 35 U.S.C. § 103(a) over Stefandl in view of Beyts.

Stefandl is directed to a product which is rendered frozen in a household freezer and which can be consumed under normal ambient temperature conditions. As discussed during the interview, the beverages of the present invention are quite different as they are formulated for dispensing from a frozen carbonated beverage

fountain. Applicants have amended claims 13, 23, 31, 37 and 54 to clearly state, as defined in the specification, that the dispenser includes a mechanical mixing chamber, and thus it is not a static unit for use in a home refrigeration system. Support for this amendment can be found at, for example, paragraph 2, which describes the fountain as a mixing chamber having a rotating agitation shaft from which the beverage is dispensed. Further, at paragraph 4, the dispensing conditions are characterized based upon a frozen carbonated beverage machine under normal operating conditions. Thus, it is readily apparent from the specification that Applicants disclose a dispenser including a mechanical mixing chamber from which their frozen beverage may be dispensed.

Since Stefandl does not teach a beverage capable of being dispensed from a dispenser including a mechanical mixing chamber, withdrawal of all grounds of rejection based upon Stefandl are respectfully requested.

**Rejections based on Marulich**

Claims 1, 2, 4-6, 9-10, 21, 24, 26-29, 32-36, 44-52, 64-81, 91-102 and 104-105 have been rejected over Marulich in combination with Cole and DeCock and in some instances further in view of Beyts or Anderson. Like Stefandl discussed above, Marulich is concerned with the production of a slush-type beverage that can be enjoyed in one's own home. Marulich like Stefandl is concerned with the production of slush beverage in a home freezer. As discussed above, the beverages of the present invention are quite different as they are formulated for dispensing from a frozen carbonated beverage fountain including a mechanical mixing chamber. Since Applicants have amended claims 13, 23, 31, 37 and 54 to clearly define the dispenser

as including a mechanical mixing chamber and thus it is not a static unit for use in a home refrigeration system, the rejections based upon Marulich have been overcome and their withdrawal is earnestly solicited.

**Conclusion**

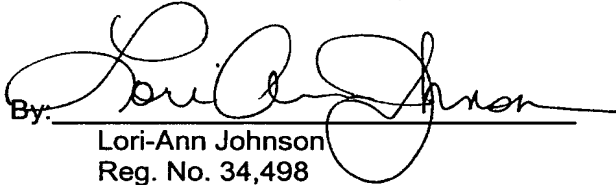
In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration and the continued examination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

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By:   
Lori-Ann Johnson  
Reg. No. 34,498